

No. 46905-7-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

Vs.

JEREMY THOMAS STEVENS,

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF KITSAP COUNTY

Cause No. 13-1-01058-2

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF THE CASE

The appellant adopts the statement of the case as previously submitted in his opening brief by reference.

II. ARGUMENT

A. The Testimony Does Not Support a Conviction For Counts III and IV.

As argued in appellant's opening brief, the undisputed testimony does not support a conviction of these charges. The victim never testified that she had any sexual contact on the dates alleged in these counts and the evidence was inconsistent with the jury's finding of guilt.

Moreover, given the questions asked by the jury, it appears that they used other conduct to form the basis for these convictions that did not comport with the state's decision to elect specific conduct to specific counts. Thus, the Court should reverse the convictions of these counts.

B. The Court Should Reverse the Special Verdict Finding Because It Allowed Mr. Stevens to be Sentencing to a Sentence Above the Guidelines Without Proof Beyond A Reasonable Doubt as to the Aggravating Factor.

The state concedes, as it must, that if the special verdict form did not include all of the elements of the aggravating factor, then automatic reversal is required. State's Brief at 34.

In an attempt to avoid this requirement, it suggests that the words "...prolonged period of time..." are merely definitional. State's Brief at 34-35. However, as the Washington Supreme Court recently ruled, the jury is required

to determine in making a finding that the abuse occurred over a prolonged period of time. *See State v. Brush*, __ Wn. 2d __, No. 90479-1 (July 2, 2015).

In reversing, the Court noted:

...we question the propriety of instructing the jury based on case law that did not take into account the jury's role in determining facts that increase the penalty for a crime. *Barnett* was published prior to the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 124 S. Ct. 2531, 159 L. Ed. 2d (2004). In *Blakely*, the Court held that a defendant has the right for a jury to determine any fact that increases the penalty for a crime. *Id.* at 301, 313-14. The Court of Appeals has explained that after *Blakely*, the jury must determine whether a particular pattern of abuse occurred over a "prolonged period of time"----not the trial court. *See State v. Epefanio*, 156 Wn. App. 378, 392, 234 P.3d 253 (2010). Given this change, we are hard pressed to see why a jury should be instructed on pre-*Blakely* case law involving a trial court's judgment regarding whether abuse occurred over a "prolonged period of time."

Brush, at 9.

Thus, it is clear that the instruction was required to have the jury determine whether the conduct occurred over a prolonged period of time and not based on a similar instruction that was the basis for a reversal in *Brush*. Additionally, the definitional instruction given here was essentially identical to the instruction given in *Brush*, which was declared to be an inappropriate comment on the evidence.

Finally, the findings entered by the court (and prepared by the state) also reflected the erroneous special verdict form given to the jury—an acknowledgment that the jury never made this factual finding. As such, the court should reverse.

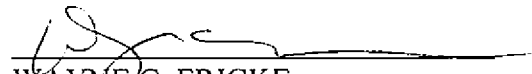
III. CONCLUSION

Based on the above points and authorities, as well as those previously argued, the appellant requests that the court reverse his convictions and sentence in whole or in part.

DATED this 1 day of September, 2015.

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant

By:


WAYNE C. FRICKE
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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the reply brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 1st day of September, 2015.



Lee Ann Mathews

HESTER LAW OFFICES

September 01, 2015 - 9:06 AM

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